SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND PART 48
Justice

BETH SOLLENDER,

Plaintiff,

-against-

HSBC SECURITIES (USA), INC. et al.,

Defendants.

INDEX NO. 110400/07
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that: This is an employment discrimination case. The plaintiff Beth Sollender was employed by defendant HSBC Securities (USA), Inc. from March 1, 2004 to her termination on April 20, 2007, first as a Financial Advisor ("FA") and then as a Personal Investment Advisor ("PIA"). She alleges that, in violation of state and city law, the defendants subjected her to numerous inappropriate sexual and religious-related comments which created a hostile workplace, imposed disparate terms and conditions of work based on her gender and then, after she complained to her supervisor about being harassed and discriminated against, retaliated by firing her. In addition to HSBC, this action is brought against two of plaintiff's former supervisors, Jeffrey Kraebel and Christopher Alexis. The complaint initially asserted four causes of action. However, by decision and order dated December 16, 2009, the second, third and fourth causes of action, as well as the plaintiff's nonenumerated claim for breach of Labor Law § 740, were dismissed pursuant to a motion by the defendants which was granted on default. In the only remaining cause of action, plaintiff alleges sexual harassment and gender discrimination, religious harassment and discrimination and retaliation, all in violation of section 296 of the New York State Executive Law ("State Human Rights Law") and section 8-107 of the New York City Administrative Code ("City Human Rights Law"). The defendants have now moved to dismiss the remaining cause of action.

Discussion

A. Hostile Workplace Based on Religious and Sexual Harassment - - The defendants first argue that the plaintiff has failed to set forth a prima facie case of a hostile workplace based on religious or sexual harassment under either the State or City Human Rights laws. In order to establish a hostile work environment based on such harassment, a plaintiff must show that 1) she belongs to a protected group, (2) she was subject to unwelcome harassment, 3) the harassment was based on sex or on her religion, 4) the harassment affected a term, condition or privilege of employment and 5) the employer knew or should have known of the harassment and failed to take remedial action. *Farrugia v. North Shore Univ. Hosp.*, 13 Misc3d 740, 747-49 (Sup Ct. NY 2006).

Under federal law, as well as under the State Human Rights Law, in order to establish that an unlawful hostile work environment existed, a plaintiff must also demonstrate that the harassment was sufficiently severe or pervasive to alter the conditions of and create an abusive working environment. *See Morse v. Cowtan & Tout, Inc.*, 41 AD3d 563, 564 (2nd Dept. 2007). *See also Harris v. Forklift Systems, Inc.*, 510 US 17, 21 (1993); *Forrest v. Jewish Guild for the Blind*, 3 NY3d 295, 305 (2004). However, a claim of workplace harassment under the City Human Rights law must be analyzed somewhat differently in light of the Local Civil Rights Restoration Act of 2005. *See* Local Law No. 85 [2005] of City of New York § 1 [Local Civil Rights Restoration Act of 2005]; *Williams v. New York City Housing Authority*, 61 AD3d 62 (1st Dept. 2009). This Act requires state courts to interpret the City Human Rights Law in a manner that

is more liberal than, and independent of, the corresponding state and federal civil rights laws. *See Jordan v. Bates Adv. Holdings*, 11 Misc 3d 764, 770-771 (Sup Ct. NY 2006).

In moving for summary judgment, the defendants argue that the plaintiff's claim of a hostile workplace based on sexual or religious harassment do not meet the minimum standards needed to support such a claim because they do not establish a pattern of harassment that was severe or pervasive and because they do not indicate that the plaintiff was targeted because of her sex or religion. The court agrees.

As to religion, the plaintiff's claim is based , in part, on her contention that she heard a colleague, on a single occasion, refer to her as a "little rich Jewish girl" and that she was told by others that it was thereafter repeated. Even if this isolated reference was otherwise actionable, which it is not, the plaintiff has conceded that it immediately stopped after she complained to her supervisor. The plaintiff's religious harassment claim is also based on her contention that sales meetings were held to her exclusion on Jewish holidays, that her supervisor implied that he was disappointed by her absence from work on the Jewish holidays and that she received a call from someone from the company's Human Resources Division on the eve of Yom Kippur. The plaintiff, however, has failed to establish that any meetings, much less important meetings, were held in her absence on Jewish holidays. She has also failed to establish that the comments made to her were anything other than isolated. Her claim of a hostile work environment based on religion must therefore be dismissed.

As to sexual harassment, the plaintiff claims that two male colleagues would, in her presence, often engage in inappropriate conversations about their sexual interests and conquests. However, as the defendants point out, the plaintiff's office cubicle was located on a different floor from these two workers during the period in question. In any event, the comments were not directed at her and there is no indication that plaintiff ever complained about these colleagues to her supervisor.

The primary focus of plaintiff's sexual harassment claim is on her former supervisor, defendant Alexis. She claims that he would look frequently look at her chest whenever they spoke, follow her around the office and call her at home. The calls to her home were, however, work related, as was his presence around her in the office. The plaintiff's subjective belief that Alexis's conduct was sexual is unsupported by any objective evidence. Indeed, the plaintiff has not suggested that Alexis ever propositioned her or said anything to her which was sexual in nature. Her claim of a hostile work environment based on sex must therefore also be dismissed.

As to the plaintiff's claim that she was subjected to disparate treatment in the terms and conditions of work based on her religion and gender, she cites no evidence of religion playing any role in her alleged disparate treatment. As to gender discrimination, plaintiff asserts that there were numerous ways in which she was placed at a disadvantage at work because she is a female. First, she claims that she was the only PIA who was not made a Vice-President. This assertion is incorrect since at least two male PIA's were never made Vice-President. In addition, as defendants point out, when plaintiff first became a PIA, her supervisor sought to make her a Vice-President but was turned down by a female officer in the company. Second, plaintiff claims that business meetings were held at topless bars, thus making it awkward, if not impossible, for her attend. In addition to the fact that these alleged meetings only took place during plaintiff's first year with the company when she was an FA, this claim is based on what unidentified persons told her and is otherwise unsupported by any evidence. Third, plaintiff claims that her salary and commissions were set at a lower rate than her male colleagues but has failed to provide any evidence in support of this assertion. The defendants, however, have submitted evidence which suggests that there is no merit to the plaintiff's claim. Indeed, although plaintiff claims that she was forced to split commissions with male colleagues because she is a woman, the evidence shows that she was only required to do so with respect to one account which was considered to be sufficiently complex so as to call for someone

experienced in that area to help her. Not only is there no basis for concluding that this decision was gender-based, but no commissions were ever generated so, in fact, there was nothing to split.

Fourth, plaintiff complains about a number of performance initiatives which were imposed on her, such as the requirement that she be present in the office by 9 a.m. and advise her supervisor's secretary about her daily appointments. The record, however, shows that these same requirements were also imposed on a number of plaintiff's male colleagues. Fifth, plaintiff claims that she was assigned "problem accounts" requiring "high maintenance." Not only has she failed to offer any probative in support of this claim, she has failed to show that any such assignments were based on her gender. Finally, plaintiff claims that, unlike her male colleagues, she was denied a sales assistant, a Bloomberg terminal and a Blackberry. However, there is documentary evidence, as well as testimony, indicating that no PIA's were provided with company-issued Blackberry devices. In addition, although plaintiff may not have been given a Bloomberg terminal while she was an FA, the company has submitted documents indicating that she had such a terminal after becoming a PIA. As to the assignment of a sales assistant, there is clearly a factual dispute among the parties on this issue. Nevertheless, even if plaintiff is correct, it hardly rises to an actionable level under the City or State Human Rights laws. Under the circumstances, the court is persuaded that plaintiff's claim that she was subjected to disparate treatment in the terms and conditions of work based on her religion and gender must be dismissed.

B. Retaliation - - Under both the State and City Human Rights laws, it is unlawful for an employer to retaliate against an employee because the employee has opposed a discriminatory employment practice. *See* Executive Law §296; NYC Admin. Code § 8-107(7). To establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) he or she was engaged in a protected activity, (2) the employer was aware of that activity, (3) he or she suffered an adverse employment action such as termination and (4) there was a causal connection between the protected activity and the adverse employment action. *See Torge v. New York Society for the Deaf*, 270 AD2d 153 (1st Dept. 2000); *Distasio v. Perkin Elmer Corporation*, 157 F3d 55, 66 (2nd Cir 1998). Once the plaintiff establishes a prima facie case of retaliation, the defendant must establish, through rebuttal evidence, a "legitimate, independent, nondiscriminatory reason" for its actions. *See Sogg v. American Airlines, Inc.*, 193 AD2d 153, 156 (1st Dept 1993). *See also Tomka v. Seiler Corp.*, 66 F3d 1295, 1308 (2nd Cir 1995); *Salerno v. City Univ. of New York*, 2003 WL 22170609, * 9 (SDNY). Upon the submission of such evidence, the burden shifts to the plaintiff, who must then prove, by a preponderance of the evidence, that defendant's stated reasons for its actions are only a pretext. *See Tomka v. Seiler Corp.*, 66 F3d at 1308. *See also Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997). The plaintiff must then establish the existence of a material issue of fact as to whether 1) the employer's asserted reason for the challenged action is false or unworthy of belief *and* (2) more likely than not the real reason was one of retaliation. *Id.* at 630.

Here, the defendants have submitted substantial documentation showing that they were dissatisfied with plaintiff's performance over a number of years and that she consistently received low ratings on her annual performance reviews. The documents also show that, in 2006, the defendants were troubled by plaintiff's management skills, use of the company's corporate credit card, attendance record and low revenue production. As a result of the concerns about her use of the company's credit card, Alexis sent plaintiff a "Final Written Warning" in August, 2006 informing her that her use of the card had been rescinded and that she faced immediate termination if she ever again abused the card. In a memorandum dated September 6, 2006 which was addressed to Alexis but also delivered to three other HSBC management employees, plaintiff expressed shock at his allegations, denied that she had done anything wrong, claimed, without detail, that she had endured harassment and sexual and religious discrimination at the company and that Human Resources had been unresponsive to her complaints. She advised Alexis that she would longer tolerate such abuse, would seek legal recourse if it continued and believed that it would be best if she was assigned a new supervisor at HSBC.

In October, 2006, plaintiff was assigned a new supervisor, defendant Kraebel, who immediately required plaintiff to be in the office no later than 9 a.m. The defendants have submitted documents indicating that plaintiff failed to do so. In any event, on November 17, 2006, plaintiff began a leave of absence after having been diagnosed with chronic-fatigue/Epstein-Barr syndrome. She did not return until April 9, 2006. She was terminated 11 days later, on April 20, 2007. The defendants have submitted documents generated during this 11-day period indicating that she missed numerous meetings, failed to regularly come to work and never completed a business plan she had been requested to prepare.

In this action, plaintiff claims that she was terminated in retaliation to the September 6, 2006 letter she wrote to Alexis accusing the company of having discriminated against her on the basis of her religion and gender. Her claim of retaliation is based entirely on her argument that there was a temporal proximity between this letter and her termination since she had taken a leave of absence only two months after the letter was delivered and was then fired less than two weeks after her return. She argues that since she was terminated after having actually been at work for less than three months after the letter was delivered, there is a temporal connection between the two events. Even if the court credits this argument, the defendants have nevertheless established through their submission of ample documentation that, as discussed above, the company was disturbed about the plaintiff's performance both before and after her leave of absence. The plaintiff has failed to provide any evidence that these documents were pretextual and that more likely than not the real reason for her termination was one of retaliation. In the absence of any evidence of retaliatory animus, the temporal connection alone is insufficient to defeat summary judgment. *See, e.g.*, *Baldwin v. Cablevision Systems Corp.*, 65 AD3d 961, 967 (1st Dept. 2009); *Koester v. New York Blood Center*, 55 AD3d 447, 449 (1st Dept. 2008); *Farrugia v. North Shore University Hospital*, 13 Misc3d 740, 753 (Sup Ct NY Co 2006); *Galimore v. City University of New York Bronx Community College*, 641 F Supp2d 269, 289 (S.D.N.Y. 2009); *Chojar v. Levitt*, 773 F Supp 645, 655 (S.D.N.Y. 1991). The plaintiff's claim of retaliation must therefore also be dismissed.

Accordingly, the defendants' motion for summary judgment is granted and the complaint is hereby dismissed.

The Clerk Shall Enter Judgment Herein

Dated: 12/9/10

MGD

MARYLIN G. DIAMOND, *J.S.C.*

Check one: [X] FINAL DISPOSITION

[ ] NON-FINAL DISPOSITION